Valeo Sylvania, L.L.C. and United Steelworkers of America AFL-CIO, CLC. Cases 25-CA-26769-2 and 25-CA-26769-3

May 29, 2001

DECISION AND ORDER BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On January 31, 2001, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions² and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Valeo Sylvania, L.L.C., Seymour, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

- 1. Substitute the following as paragraph 1(e).
- "(e) Suspending or discharging employees because they engage in concerted protected conduct (i.e., distributing union literature) and union activities."
- 2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with unspecified reprisals because of your union support and activities.

WE WILL NOT threaten to call the police to remove you from nonworking areas of our property because you are distributing union literature in those areas when you are off-duty.

WE WILL NOT call the police to remove you because you are distributing union literature in nonworking areas of our property when you are off-duty.

WE WILL NOT suspend or discharge any of you because you engage in concerted protected conduct (i.e., distributing union literature) and engage in union activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Ronald Roy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Roy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Ronald Roy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

VALEO SYLVANIA, L.L.C.

Raifael Williams, Esq., for the General Counsel.
John T. Lovett, Esq., of Louisville, Kentucky, for the Respondent.

Jeffrey Abbe, for the Charging Party.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Chairman Hurtgen finds it unnecessary to pass on whether the suspension and discharge of employee Ronald Roy violated Sec. 8(a)(3) under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Inasmuch as the judge found that the Respondent's suspension and discharge of Roy violated Sec. 8(a)(1) under the principles of *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), a finding that the same conduct also violated Sec. 8(a)(3) under *Wright Line* would be cumulative and would not affect the Order or notice.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on May 11 and 12, 2000. Two charges were filed by the United Steelworkers of America, AFL–CIO, CLC (Union) against Valeo Sylvania, L.L.C. (Respondent) on October 6, 1999. A consolidated complaint was issued on January 28, 2000, essentially alleging that during the course of an organizing campaign the Respondent, by and through Supervisor Andy Wantland, twice unlawfully interrogated Union Organizer Ronald Roy in violation of Section 8(a)(1) of the Act. The complaint further alleges that in the course of distributing union literature to employees at the Respondent's facility, Union Organizer Ronald Roy was suspended and later discharged in violation of Section 8(a)(1), as well as Section 8(a)(3) of the Act.

The Respondent's timely answer, which it later amended, denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT I. JURISDICTION

The Respondent, a corporation, is engaged in the design, development, manufacture, and distribution of automotive lighting products at its facility in Seymour, Indiana, where it annually purchases and receives goods valued in excess of \$50,000, directly from points located outside Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

In May 1999, the Union sought to organize the Respondent's employees at its Seymour, Indiana facility. Ronald Roy, a 3-year employee, was active in the organizing campaign. He initiated the campaign by contacting and meeting with Union Organizer Jeffrey Abbe. Following that, Roy obtained employee signatures on union authorization cards, wore union buttons, talked to employees about the organizing effort, had a union bumper sticker on his truck, and distributed union literature in breakrooms and the parking lot.²

The Respondent at various times during the organizing campaign held large and small group meetings to oppose the Union's organizing efforts. At the large group meetings, the Respondent's president and general manager, James Johnson,

along with other members of management, explained to the employees why the Respondent opposed the Union. At the small group meetings, which were organized by shifts, various supervisors distributed antiunion literature and showed the employees movies about striking employees.

B. Supervisor Andy Wantland's Comments to Ron Roy

1. The July 30 and 31 incidents

On July 30, 1999, Supervisor Andy Wantland approached Ron Roy as he worked on the production line. Roy testified that Wantland asked him, "[W]hat was going to happen or said he had heard things was going to happen and stuff and he had asked what was going on?" (Tr. 68.) Roy interpreted the question to mean, "[W]hat was going on with the union?" As he had done on other occasions, Roy told Wantland he had no idea what he was talking about or that he did not know. Roy stated that there were other employees working in the area, but he did not know if they overheard the conversation.

As Roy left the building at the end of his shift, he saw Union Organizer Jeff Abbe handbilling at the edge of the road where employees entered the parking lot. He talked to Abbe for a few minutes and then took some handbills over to two employees in the parking lot. Roy testified that as he approached the employees in the parking lot, Supervisor Jerry Keltner exited the building, came up to him, and told him to get off the property. Roy told Keltner that he was off the clock, but Keltner insisted that he had to leave the premises. (Tr. 70.) After a few seconds of debate, Roy walked to the street where he began handbilling.³

The next day at work, as Roy returned from his dinner break, he encountered Supervisor Andy Wantland, who asked him if he had a problem with another supervisor the previous night. Roy testified that he told Wantland what transpired between he and Keltner, but that he did not think there was a problem. According to Roy, Wantland responded, "Well, Ron, you can't be doing what you're doing, union business, on company property." (Tr. 72.) Roy disagreed and told Wantland that he had a right to be in the parking lot Roy testified that Wantland stated, "I don't want to see you get in trouble, you can't do what—you can't do the union business." Roy offered to show Wantland a "copy of the law," which he provided to Wantland later that day. According to Roy, after Wantland read whatever Roy had showed him, he apologized and conceded that Roy had the right to handbill in the parking lot.

Wantland generally denied ever discussing the Union with Roy. (Tr. 277.) Rather, he unpersuasively testified that he only exchanged pleasantries with Roy on an occasional basis because during the organizing campaign he was not Roy's supervisor. However, the credible evidence shows that Wantland supervised Roy until June 1999, when Roy was transferred to

¹ All dates are in 1999, unless otherwise indicated.

² The parties do not dispute that Roy was an open and active union organizer known to the Respondent. (Tr. 15.)

³ There is no evidence that the Respondent has a valid no-access rule applying to off-duty employees. See *Tri-County Medical Center*, 222 NLRB 1089 (1976). Rather, the evidence shows that the Respondent has a written no-solicitation/distribution policy in its employee hand book that prohibits employees from soliciting and distributing literature during work hours and in work areas. (GC Exh. 13.) That policy is not in issue in the present case.

another area. In July 1999, Roy was placed under Wantland's supervision again. (Tr. 283.) Thus, contrary to Wantland's denials, the evidence that Wantland was Roy's supervisor for a large part of the organizing campaign. (R. Exh. 15; Tr. 282–283.) For these, and demeanor reasons, I credit Roy's testimony that Wantland admonished him about conducting union business on company property and that he warned Roy that he would get into trouble if he continued to do so.

2. The August incident

Wantland had a girlfriend named Lisa Gay who also worked for the Respondent. Sometime in August 1999, she invited a few friends, including fellow worker, Brad Smith, over to Wantland's house after work for a few beers. Roy came along with Smith. At some point, Lisa Gay and Roy began talking about the Union when according to Roy she stated, "I don't think I want to get involved with that . . . you'll get fired." (Tr. 73.) Roy testified that he tried to explain to Gay that the Respondent could not legally fire someone for being involved with a union, when Wantland interjected, "Ron, you will pay for what you're doing... I won't get involved or do anything, [but he said] you will pay for what you're doing." (Tr. 73.)

Wantland acknowledged that Roy visited his home one evening along with Lisa Gray and Brad Smith. He also admitted that his girlfriend and Roy discussed the Union in his presence. However, Wantland denied making any statements that night to Roy about the Union and he also denied that he implied that Roy's future employment would be adversely affected because of his union involvement. (Tr. 278.) Although Wantland admitted asking Roy if he could see a blank union card because he had never seen one before, he stated that he looked at the card and handed it back to Roy without saying anything. His testimony was not convincing. It is implausible that in the comfort of his own home, Wantland did not join the discussion between Gay and Roy about the Union. It is also implausible that Wantland precipitously asked Roy to see a blank union card, looked at it, and handed it back to Roy without saying anything. For demeanor reasons, I credit Roy's testimony that when he attended the social gathering at Wantland's house in August 1999 Wantland warned him that his union involvement would somehow affect his employment with the Respondent.

3. Analysis and findings

a. The alleged unlawful July 30 interrogation

Paragraph 5(a) alleges that Wantland unlawfully interrogated Roy on July 30, 1999, in violation of Section 8(a)(1) of the Act. In *Midwest Stock Exchange v. NLRB*, 635 F. 2d 1255 (7th Cir. 1980), the Seventh Circuit Court of Appeals stated:

It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights. To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

The evidence shows that Roy was an active union supporter, that the conversation between Wantland and Roy occurred on

the shop floor, that Wantland made no direct or implied threats, and moreover that Wantland did not even mention the Union or the word "union" at anytime during the conversation. Also, there is no evidence that Wantland pursued the conversation after Roy told him he had no idea what he was talking about. Under the totality of circumstances, I find that Wantland's questioning of Roy on July 30 to be noncoercive and, therefore, I shall recommend the dismissal of paragraph 5(a) of the complaint. Rossmore House, 269 NLRB 1176 (1984).

b. Subsequent unlawful threats and interrogation

The credible evidence also shows that on July 31 Wantland asked Roy if he "had a problem" with another supervisor the previous day which was a clear reference to the incident in which Supervisor Jerry Keltner told Roy that he could not handbill in the parking lot, even though Roy was off-duty in a nonworking area. Wantland stated that he did not want to see Roy get into trouble for doing union business on company property, which reasonably implies that his union activities might harm his employment status with the Respondent, and which would have reasonably caused Roy to fear reprisals for engaging in such activities. Boydston Electric, 331 NLRB 1450 (2000). Thus, I find that in the context of unlawfully threatening him with unspecific reprisals for engaging in union activities, Wantland's questioning of Roy about "a problem" the day before constituted coercive interrogation in violation of Section 8(a)(1) of the Act as alleged in paragraph 5(b) of the complaint.

Finally, the credible evidence shows that Wantland again threatened Roy with unspecific reprisals in August 1999, when in an informal discussion at Wantland's house between Roy and Lisa Gay about the Union Wantland warned Roy that he was going to pay for what he was doing. I find Wantland unlawfully threatened Roy in violation of section 5(c) of the complaint in violation of Section 8(a)(1) of the Act.

C. The Events Preceding Roy's discharge

1. Handbilling on September 19, 1999

On Sunday morning, September 19, 1999, Roy and several other union supporters gathered to handbill at the entrances to the Respondent's property. They initially met in a city parking lot across from the west side of the Respondent's facility. When Roy arrived at approximated 10:05 a.m., Union Organizers Jeff Abbe and Bill Kaiser, and several employees were already present. (Tr. 75, 151, 164.) The group waited about 20 minutes for other employees to join them. Employee Theresa Dorsett was one of the last to arrive. (Tr. 179.)

About 10:35 a.m., Abbe and employee Dorsett went to the west parking lot to handbill. Roy went to the north entrance of the east parking lot where he handbilled alone. (Tr. 76; GC Exh. 9.) Fifty yards away, but within clear view of Roy, employee Luther Collins handbilled at the east entrance of the east parking lot. (Tr. 84.)

Security guard Marty Sutton, an employee of Burns Security Co., was on duty that morning. He testified that while watching the security camera monitor at 11:20–11:25 a.m., he saw two men wearing dark clothes enter the Respondent's plant by

the WJ line. Sutton stated that within minutes he intercepted the two men inside the plant. According to Sutton, when he asked the two men for their company identification badges, one of them told him, "f—k you, read my shirt, I work here." (Tr. 201.) Sutton testified that he asked them to leave the building, which they did.

Minutes later, an employee told Sutton that union supporters were handbilling by a parking lot. According to Sutton, he went down the driveway to where two men, whom he later learned were Ron Roy and Jeff Abbe, were standing. Sutton testified that they were the same two men that he had asked to leave the plant a few minutes earlier. Sutton further testified that he walked up to Roy and Abbe and asked them to step off the property. At that point, Roy told him, "I don't have to, I work here," to which Sutton responded, "[S]ir, you have to step off the property while you're doing your union business." (Tr. 201.) Sutton testified that Roy told him, "F-k you, mother fker, I don't have to." Sutton testified that when he told Roy that he was going to call the police if he did not leave the property, Roy stated, "[W]ell, you go in and call the police department and your best bet is to stay in the building, not to come back out here." (Tr. 202.) Sutton testified that he phoned his supervisor, who told him to call the police, so he did.

Roy's version of what occurred was different. He testified that he was handbilling alone at the north entrance to the east parking lot, when Sutton approached him at a fast pace, swinging his arms back and forth, and yelling at him to get off the property. Roy testified that he told Sutton that he was not on company property and even if he had been he had a right to be there because he worked for the Company. Roy stated that Sutton told him that the Company wanted to keep union business off the property and if Roy did not get off the property, Sutton would call the police and have him arrested. Roy stated that he replied, "[G]o call the police." (Tr. 83.) At that point, Sutton started walking toward the guardhouse when he saw employee Luther Collins at the east entrance and yelled to him to get off the property. (Tr. 192.) Roy hollered to Collins that Sutton was going to call the police.

Employee Luther Collins was handbilling about 60 yards away from Roy. He testified that he had been handbilling about 30–40 minutes, when he saw the security guard coming from the plant, waving his hands, and heard him yelling at Roy to get off the property. (Tr. 191, 193.)⁵ Collins testified that when Roy hollered to him that the Sutton was going to call the police, he told Roy to get Union Organizer Jeff Abbe. Roy got into his truck and drove around the facility to the south parking lot where he picked up Abbe and drove him to the north entrance. Abbe told Roy to drive around the facility again and if there was more than one person on a gate to drive the extra persons to the north entrance. (Tr. 156.) Roy left and picked up employee Bev Ball. As they approached to the north entrance, a police car was stopped along the edge of the road. A police officer was talking to Jeff Abbe. (Tr. 157.)

Roy testified that he exited his truck and walked toward the officer, who asked him what had happened. The police officer specifically asked Roy if he had threatened Sutton to which Roy responded, "[I]f telling him to go call the police is a threat, then I threatened him." (Tr. 88.) Roy gave the officer his name and address and showed him where he was standing while handbilling.

The officer walked up to the guard station where he spoke to Sutton. A few minutes later, he returned to tell Roy and the others that they could continue handbilling, but they could not go on company property. The police returned to his patrol car where he waited for a few minutes. In the meantime, Sutton came down to the road to ask Roy for his name. Roy refused to provide the information and instead told Sutton to get his name from the police officer. When Sutton asked the police officer for Roy's name, the police officer would not give it to him. Instead, he told Sutton that he could get it from his report. Sutton walked back to the plant and the police left.⁶

By the time Sutton returned to the plant the second time, several employees had gathered on an outside patio. Among them were employees Neal Snowden and Tony Brewer, and a supervisor named Robert Scott. To these three, Sutton appeared to be "visibly shaken," "upset," and "afraid." He told them his version of what transpired between he and Roy, i.e., that Roy had used profane and threatening language and refused to identify himself. He asked them if they could identify Roy and Abbe, but neither Snowden nor Brewer knew Roy's name. Instead, they could only tell him that he was employed by the Respondent. Scott identified Roy from a distance, but to be sure he walked down through the east parking lot, and up to the handbillers at the entrance. He looked at Roy stating that he wanted to see who he was. Roy testified that he identified himself to Scott.

Sutton completed an incident report concerning the two men who purportedly entered the plant earlier in the day. He identified the two as Roy and Abbe. (R. Exh. 1.) He testified that he left work shortly afterwards because he "was shook up from the threat to my life." (Tr. 237.) The next day, Sutton completed a second incident report concerning the handbilling incident. (R. Exh. 2.) On both reports, Sutton noted that the time of incident was "12:02."

2. Shaner's investigation

Stewart Shaner is a director—human resources for the Respondent, who has over 30 years' human resources experience. In August 1999, he was transferred to the Respondent's Seymour facility shortly before the Union filed a petition for representation. Shaner was brought to the Seymour facility as part of the Respondent's preparedness effort in anticipation of the Union filing of a representation petition. (GC Exh. 17.)

When Shaner arrived at work on Monday morning, September 20, 1999, there were rumors abound about the incident which occurred the preceding day. (Tr. 291.) Shaner heard that the police were called and that Roy had verbally abused

⁴ Sutton testified that the Respondent has a videotape security monitor system. (Tr. 232.)

⁵ Collins stated that Sutton also yelled at him from a distance to get off the property.

⁶ Abbe testified that Sutton appeared agitated because the policeman would not move them into the roadway where Sutton wanted them to go. (Tr. 172.)

and threatened Sutton in the parking lot. After reviewing Sutton's incident report concerning two men entering the plant, Shaner and Company Attorney John T. Lovett, met with Sutton and his supervisor, Michael Wood, in Shaner's office. (Tr. 217.) Sutton gave Shaner and Lovett his account of what occurred. (Tr. 293–294.) Lovett prepared a handwritten statement for Sutton to sign, which began with a *Johnnie's Poultry* statement, followed by numbered paragraphs. §

Over the next 2 days, Shaner and Lovett spoke with Snowden, Brewer, and Scott. None of them heard or saw first hand what transpired between Sutton and Roy. Rather, they relayed to Shaner what Sutton had told them, along with their observations that Sutton appeared upset, shaken, and afraid. Scott testified that when he walked to the end of the parking lot to confirm that the individual involved was Roy, he did not see him wearing an identification badge. (Tr. 272.)

On Thursday, September 23, at about 4:30 p.m., Supervisor Wantland asked Roy to accompany him to Shaner's office. There, Shaner questioned Roy about the September 19 incident, while the company nurse, Kelley Elsner, took notes. (GC Exh. 12.) Shaner asked Roy if he called the guard a "mother f—ker," which Roy denied. He told Roy that he had been videotaped bringing a trespasser into the facility, which Roy also denied. Roy told Shaner that he had his company identification badge with him on September 19, but that Sutton did not ask to see it. He denied threatening Sutton. Instead, he told Shaner that he told Sutton to go call the police.

Shaner prepared a handwritten statement based on what he understood to be Roy's explanation. He presented it to Roy, and asked him to read and sign it, if he thought it was accurate. (Tr. 97.) Roy declined. Roy pointed out that the statement inaccurately indicated that he "told [Sutton] that he would have to call the police." Roy also stated that he would like to have an attorney review the statement before he signed it. According to Roy, Shaner became upset, asked for Roy's identification badge, and told Roy that he was suspended until further notice. Roy left the building, but returned to get his paycheck. A short time later, Shaner gave him an envelope with his paycheck and a copy of the statement that Roy was asked to sign.

D. The Discharge

The next day, September 24, 1999, Roy called Shaner in the afternoon to ask if he could return to work. Shaner told him that his employment was terminated. Shaner ultimately determined that Roy's cumulative conduct on September 19, 1999, warranted his discharge. Shaner opined that Roy's explanation amounted to a "total denial" of Sutton's account. (Tr. 307.) He testified that with everything considered, the balance of testimony (i.e., the incident reports and the interviews with Snowden, Brewer, and Scott) was on Sutton's side. Shaner testified that he focused on the fact that Roy had used "f—k you, mother f—ker," as well as "f—k you" inside the plant; that he had repeatedly refused to identify himself to Sutton; and that

Sutton believed he was being threatened by Roy when he was told to go back in the plant and not to come back out. Roy also brought a nonemployee into the plant without authorization. Shaner stated that this cumulative conduct violated company work rules and therefore the appropriate discipline was discharge. (Tr. 305.) Shaner followed up the telephone conversation with a letter, dated September 24, 1999, advising Roy that he was discharged and the reasons therefor. (GC Exh. 4.)

On October 16, 1999, the Union lost a stipulated election to represent that Respondent's production and maintenance employees. (GC Exh. 3(b).)

E. Credibility Resolutions

The evidence shows that Marty Sutton was an inexperienced and inadequately trained security guard, who was very unsure of himself. Sutton testified that he had a fifth grade education and that when he began working for Burns Security Agency in 1999, he received "almost 30 days" training. (Tr. 213, 215.) He further testified that his training included watching videotapes and "on-the-job" training at Valeo Sylvania, his first and only assignment as a security guard. (Tr. 215.) The evidence shows, and I find, that the shortcomings in Sutton's education, training, and experience affected his ability to accurately and completely record and recall relevant facts.

The evidence shows that Sutton's first incident report (R. Exh. 1) concerning two men entering the plant was inaccurate in two respects. First, as Sutton conceded, he confused the time of incident with the time of day that he prepared the report. As Sutton testified, he did not realize his mistake until his supervisor later pointed it out to him. Second, part of the information in the first report was contradicted by another witness called by the Respondent at trial. The report states that employee Tony Brewer identified one of the two men in the plant as the "main union rep." Brewer, however, did not testify that he saw anyone leaving the plant. In fact, his testimony was devoted exclusively to the handbilling events that occurred after the police were called. Regarding those events, Brewer did not testify that there was anyone else handbilling with Roy. (Tr. 266.) Rather, he stated that Sutton asked him to "identify the individual out there." (Tr. 266.) In that connection, Brewer stated that although he knew Roy worked for the Company, he could not identify Roy, because he did not know Roy's name. (Tr. 266.) Thus. Brewer's testimony not only contradicts the statement in Sutton's first report that he identified Abbe as one of two individuals in the building, it fails corroborate Sutton's testimony that Roy and Abbe were handbilling together on company premises, and it fails to corroborate Sutton's statement that Brewer knew who Abbe was.

Sutton also contradicted himself regarding his second report. At one point he testified that it was prepared at the same time as the first report or on the same day of the incident, i.e., September 19, 1999. (Tr. 206.) He later testified that the second re-

⁷ Sutton testified that his supervisor, Michael Wood, pointed out to him that the "time of incident" recorded in Sutton's incident reports (i.e., 12:02) was not correct because it was approximately 11:25 a.m, when his supervisor told him to call the police. (Tr. 205, 217.)

⁸ Johnnie's Poultry Co., 146 NLRB 770 (1964).

⁹ The fact that Sutton associated Brewer with the incident involving two men inside the plant supports a reasonable inference that he had confused the inside incident with the outside incident involving the police. His confusion reflects his inability to accurately record and recall the facts.

port concerning the handbilling was prepared the day after the incident or on September 20, 1999. (Tr. 239–240.)

In addition, there is no evidence corroborating Sutton's statement and testimony that two men entered the Respondent's plant sometime around 11:20 a.m. on September 19. There were no eyewitnesses to the inside incident, who were called to testify at trial. In addition, a security logbook maintained by Sutton and the other security guards makes absolutely no reference to an unauthorized entrance to the plant. Sutton testified that the security guards maintain a sign-in/sign-out logbook in which they are to record when they come on and off duty, when they begin and end rounds, and "if there's anything that's happened during the shift." (Tr. 207.) Although Sutton entered a notation indicating that he was threatened by Ron Roy (R. Exh. 3), there is no entry reflecting that he had encountered anyone inside the plant during his shift on September 19, 1999, nor did Sutton offer any explanation for this obvious omission.

Also, no videotape was offered showing two men entering the plant. Sutton testified that as he watched the videotape monitor he saw two men entering the plant, who he later learned was Roy and Abbe. (Tr. 236.) He stated that the videotape "is usually returned to Burns Security or it's turned over to Valeo Sylvania and, once they review it, if there hasn't been any incidents or anything, it's returned back to the video room." (Tr. 232.) However, Sutton testified that he did not know what happened to the videotape of the two men entering the plant. (Tr. 233.) In fact the only testimony about the existence of the videotape contradicts Sutton's testimony about how the videotapes are maintained and preserved.

Human Resource Director Shaner unpersuasively testified that the videotape of two men entering the plant was not available because presumably it had been recycled. Contrary to Sutton's testimony, he stated that videotapes are recycled if they are not removed from the video-recording machine. (Tr. 302.) Shaner testified that he did not inquire about the videotape until Tuesday, September 21, and at that time he was told by a maintenance person that it "would have been recycled, you're not going to find it, there's nothing there, it would already gone on to continuous play, that Sunday's events would have been taped over when the tape restarted." (Tr. 302.) Without actually checking himself to see if the videotape still existed, Shaner simply accepted the maintenance man's assertion that it probably had been recorded over.

Shaner's explanation is dubious. The evidence shows that he knew, or should have known, on Monday, September 20, that the videotape was important because he interviewed Sutton on Monday afternoon. The evidence also shows that Shaner had ready access to the tape before Tuesday because Sutton testified that he was interviewed by Shaner in the videotape room. (Tr. 216.) It is inconceivable that Shaner, a human resources specialist with 30 years' experience, would not have thought to ask or look for the tape while he was sitting in the videotape room. I find that the absence of the videotape, and the failure of the Respondent to offer a plausible explanation for its absence, warrants an adverse inference that it would not have shown Roy and Abbe, or anyone else, entering the plant as stated by Sutton.

Parts of Sutton's reports and testimony are also contradicted by the credible testimony of two other witnesses, who were present on Sunday, September 19. In this respect, the credible evidence shows that Roy and Abbe were at different entrances on different sides of the plant on or about the time that Sutton stated he encountered them together inside the plant and also when they were handbilling outside the plant. Employee Dorsett credibly testified that from the time the group left the city parking lot to handbill at various entrances, until the time Roy drove his truck over to the west parking lot to tell Abbe that the police had been called, which was after 11:35 a.m., Abbe never left her presence. (Tr. 181.) Likewise, employee Collins, who was handbilling 60 yards from Roy, outside the east parking lot, testified that he could see Roy handbilling for about 30-40 minutes before Sutton came down the driveway and told both of them to leave the property. (Tr. 191.)

Finally, the inability of Sutton to accurately recall and relate relevant facts was reflected in his patently false testimony about circumstances surrounding a written statement prepared by Respondent's counsel on September 20, 1999. When Respondent's counsel asked Sutton to identify the handwritten statement on direct examination, Sutton identified the document as his own statement in his own handwriting. Sutton insisted that he prepared the handwritten statement himself, even though it began with a Johnnie's Poultry statement, followed by numbered paragraphs. When asked to explain why he numbered the paragraphs, Sutton responded so he would "know what was what." (Tr. 213.) Sutton was unsure whether he prepared the handwritten statement before or after the meeting with the Human Resources Director Shaner and the Respondent's attorney. John Lovett. He was also unsure whether he was alone when the statement was prepared. Sutton nevertheless insisted that he wrote the entire statement by himself, in his own handwriting, and numbered all of the paragraphs without anyone else's assistance. (Tr. 214.)

Respondent's counsel requested that Sutton be excused from the hearing room. He then explained on the record that Sutton was "confused" and admitted that he Lovett wrote the statement and presented to Sutton to sign after interviewing him. (Tr. 215–216.) When Sutton returned to the witness stand, he was asked to compare the handwriting on the statement in dispute to the handwriting on his incident reports (R. Exhs. 1 and 2). Only then did Sutton realize, hesitantly, that the handwriting was that of Respondent's counsel and only then did he recall the true circumstances under which the statement was prepared. (Tr. 219.) I find that this scenario calls into serious question the ability of Sutton to accurately and completely recall and relate events as they actually occurred.

The Respondent nevertheless argues that Sutton should be believed because he has no motive to lie. I disagree. The unrebutted evidence shows that Sutton was acting on orders of the Respondent to keep the "union business" off its premises. It also shows that Sutton did not casually approach Roy to ask him to leave the parking lot. He rapidly approached him and yelled at Roy to get off the property. He threatened to call the police if Roy did not do so. At the very least, the evidence shows that Sutton was very "assertive." Roy, however, did not recoil. Rather, he told Sutton that he had the right to handbill

on company property and that he did not care if Sutton called the police. In other words, Roy was defiant. The fact that Roy, a larger built man than the slightly built Sutton, rebuffed Sutton's attempt to have him leave the Company's property understandably may have frightened and upset Sutton. The evidence viewed as whole, however, supports a reasonable inference that Sutton embellished the story about what Roy said to him in order to save face and to retaliate against the defiant Roy.

To make matters worse, when the police arrived they offered no solace to Sutton. After listening to both sides of the story, the police officer simply told Roy to handbill on public property. The fact that the police officer refused to give Roy's name to Sutton only served to enhance Sutton's pique. Having observed Sutton testify when he was relatively calm, and having noted how confused he was under those conditions, it is more likely, than not, that his perception of what actually occurred was less than accurate when he was upset.

Finally, the Respondent asserts that Sutton's story should be credited because it was corroborated in part by three employees (Brewer, Snowden, and Scott) who spoke to him and observed him soon after the police arrived. While I have no doubt that their testimonies of what Sutton told them and what they observed about his appearance are credible, the fact remains that they did not observe or hear first hand the encounter between Sutton and Roy. Their testimonies, therefore, are no more reliable than the source from which they received their second hand information, i.e., Sutton. I find that their second hand accounts do not rehabilitate or bolster Sutton's credibility as determined at trial.

For these, and demeanor reasons, I do not credit the aspects of Sutton's testimony that conflict with Roy's version of what occurred on September 19, 1999.

On the other hand, Ron Roy was a credible witness. His testimony was straightforward and consistent with the story that he told to Shaner on or about September 23, 1999. It was also corroborated by other witnesses who I find credible, i.e., Collins, Dorsett, and Abbe. I therefore credit Roy's testimony that he and Abbe did not enter the Respondent's plant on September 19, 1999; that he handbilled alone at the north entrance of the east parking lot; that he did not threaten Sutton or use profanity when addressing him; and that he had his identification badge on his hat.

F. Analysis and Findings

1. The 8(a)(1) violations

a. The unlawful threat to call the police and the unlawful removal of Roy from the Respondent's property

Paragraph 5(d) of the complaint alleges that on September 19, 1999, Sutton unlawfully (1) threatened to call the police if Roy did not stop handbilling in the parking lot and (2) called the police, who restricted Roy to handbilling at the entrance to the Respondent's property. ¹⁰

Section 7 of the Act grants employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." There is no evidence or argument that the Respondent had a no-access rule, valid or otherwise, restricting the distribution of literature by off-duty employees. Nor is there any evidence, or argument, that there was any business justification for prohibiting the handbilling. See *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976).

I therefore find that Roy, an off-duty employee, had a Section 7 right to distribute union literature during nonworking hours on the Respondent's parking lot. I further find that by threatening to call the police and by calling the police to remove Roy from the parking lot, the Respondent unlawfully violated Section 8(a)(1) of the Act as alleged in paragraph 5(d) (i) and (ii) of the complaint.

b. The unlawful suspension and discharge of Ron Roy

The undisputed evidence shows that Roy was discharged solely because of his "conduct on Sunday, September 19, 1999." (GC Exh. 4.) The undisputed evidence also shows that Roy's conduct was protected concerted activity. He was at Respondent's facility on a Sunday morning to distribute union literature during off-duty hours. In that context, circumstances arose which purportedly led to his suspension and discharge. The undisputed evidence also shows that Shaner's determination to terminate Roy was based on Sutton's account, which I have found to be not credible for the reasons stated above. Shaner's determination was also based on his rejection of Roy's account, which I have fully credited. Thus, the effect of my credibility findings is that the misconduct underlying Roy's suspension and discharge never occurred.

In the seminal case of *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), the Supreme Court stated that "[o]ver and again the Board has ruled that § 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. [Citations omitted.]" Because I find Sutton's account of what occurred on September 19, 1999, to be untrue, I find that notwithstanding the Respondent's arguably good-faith belief in the truth of Sutton's statements, no misconduct occurred, and the Respondent violated Section 8(a)(1) of the Act by discharging Ronald Roy for engaging in concerted protected activity.

parking lot, Roy had a Sec. 7 right to handbill outside the plant in a nonwork area during nonworking hours.

¹⁰ Roy testified that he was not on the Company's premises, but was handbilling on a public easement. Sutton stated that Roy was handbilling in the Company's parking lot. (GC Exh. 10.) The issue is of no significance because in the absence of a no-access rule for off-duty employees, or evidence of interference with the ingress or egress to the

¹¹ In its posthearing brief, the Respondent does not argue or analyze the case in the context of *Burnup & Sims*. Rather, it solely applied a *Wright Line* analysis. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Because I find that the misconduct never occurred, there is no need to determine whether the abusive and threatening remarks attributed to Roy by Sutton went beyond the scope of protected conduct under *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979). See also *Felix Industries*, 331 NLRB 144 (2000).

2. The 8(a)(3) violations

The Respondent relies exclusively on *Wright Line*. It asserts that under that analysis, the General Counsel has not proven that union activity was a motivating factor in the discharge decision. It further asserts that in any event it would have taken the same action, even in the absence of union activity. I disagree in both respects.¹²

The undisputed evidence shows that Roy was engaged in concerted protected activity, that he was known to the Respondent as an active and open union supporter, and that the Respondent opposed the Union. Regarding the latter, the credible evidence shows that the Respondent conducted meetings in opposition to the Union, unlawfully threatened Roy because of his union activities, threatened to call and called the police because he was engaged in union activities, and by its supervisors and agents prohibited Roy from handbilling during offduty hours in the Respondent's parking lot. The Respondent argues, however, that there is no casual connection between Roy's overall union activity and his suspension and discharge. The argument completely ignores the fact that Roy was engaged in concerted protected activity (i.e., handbilling) at the time of the events that precipitated his suspension and discharge. Thus, the evidence supports a reasonable inference that there was a casual connection between Roy's concerted protected activity and his suspension and discharge. Thus, I find that the General Counsel has satisfied his initial evidentiary

In contrast, the Respondent has not proffered any evidence showing that it would have taken the same action, even if the absence of Roy's concerted protected activity. Rather, the Respondent's evidence and argument focuses solely on its reasons for suspending and discharging Roy. The reasons, which according to Shaner, were cumulative and violated company rules are as follows:

- repeated refusal to identify himself
- using of abusive and threatening language
- bringing an unauthorized individual into the plant

Regarding the asserted refusal of Roy to identify himself, the Respondent does not point to any specific written rule or policy requiring employees to wear a company identification badge. Rather, in the discharge letter to Roy, dated September 24, 1999, Shaner quoted an excerpt from a May 21, 1997 edition, of the *Daily Focus*, ¹³ to support his assertions that all employees are "expected" to wear a badge:

Every associate has been issued a badge for identification and payroll purposes. But, these badges also provide another benefit. They provide identification and protection by separating those people who should be in the plant from those who should not be. For security and your personal safety, no

guests are allowed on the production floor without prior approval from management. If you see someone without a badge, please notify a supervisor as soon as possible.

[GC Exh. 4, p. 1, par. 4.]

While the excerpt implies that employees are expected to wear identification badges in the plant during working hours, it stops short of articulating a rule requiring that badges be worn at all times. ¹⁴ Indeed, the unrebutted evidence shows that many employees do not wear their identification badges at work and there is no evidence that anyone has been disciplined for failing to do so. Thus, even if article quoted by Shaner could be construed to be a promulgated rule requiring the wearing of identification badges, the stringent enforcement of the rule as to Roy would be discriminatory in the absence of any evidence that it has been equally applied to other employees.

Regarding the purported use of abusive and threatening language, the Respondent's plant rules and employee handbook prohibit employees from using profane, threatening, or abusive language. (GC Exh. 13, p. 28; GC Exh. 14, HRP–30–150, p. 2.) The unrebutted evidence shows, however, that employees and supervisors use profanity on a daily basis in the plant, but there is no evidence that any employee has been disciplined for using profanity or abusive language. Thus, the evidence supports a reasonable inference that the Respondent's enforcement of its rule and policy has been lax and that it sought to stringently apply the rule to Roy who was engaged in protected concerted activity.

Nor does the evidence support a finding that Roy's protected conduct lost the protection of the Act under the factors set forth in *Atlantic Steel Co.*, supra. The evidence shows that purported the abusive and threatening language was communicated out of sight and earshot of anyone else. With respect to the inside plant dialogue, the evidence discloses that when Sutton asked Roy to see his identification badge, Roy responded "f—k you, read my shirt, I work here." Sutton then told Roy and Abbe to leave, which they did, without further incident or discussion. No threats were made by Roy and the type of profanity used was tantamount to "shop talk."

With respect to the outside parking lot incident, the unrebutted evidence discloses that Sutton was walking at a fast pace, waving his arms, as he approached Roy yelling at him to get off the company's property. When he told Roy that he had to do his "union business" off the property, Roy responded that he had a legal right to distribute union literature. When Sutton threatened to call the police, Roy purportedly told him, "f—k you, mother f-ker, go ahead and call the police, and if you know what's good for you, go back inside and stay there." The evidence shows that the subject matter of the discussion dealt with Roy's protected right to handbill on the Company's parking lot during off-duty hours and that his purported comments where provoked by Sutton's unlawful threat to call the police. Roy's purported verbal threat was not accompanied by any physical threat and after the brief exchange, both individuals walked off in opposite directions. Under these circumstances, I

¹² In light of the above, my credibility determinations, and my finding that no misconduct occurred, a *Wright Line* analysis can be pursued solely on the basis that the Respondent acted in good faith on Sutton's account of what occurred. The pursuit of a *Wright Line* analysis, therefore, does not alter my finding that Sutton's account was not credible.

¹³ At trial, Shaner did not explain what the *Daily Focus* was, who received it, and how often it was distributed.

¹⁴ Nor does the excerpt address the circumstances, like those present here, where an off-duty employee is outside the Respondent's plant.

find that Roy's conduct did not lose its protected status. See generally, "The Loft", 277 NLRB 1444, 1467 (1986).

Finally, with respect to the assertion that Roy brought an unauthorized person into the plant, the evidence shows that the Respondent has a rule requiring all visitors to register in the lobby and that visitors are restricted to the front area and the cafeteria. (GC Exh. 14, HRP–30–157, p. 1.) There is no evidence that anyone has been disciplined or discharged for failing to register a visitor or to follow this rule.

In the absence of any evidence showing that the Respondent has enforced any of its rules or policies implicated by Roy's purported conduct or that it has disciplined any employee for violation of same, the Respondent's argument that the "cumulative behavior" of Roy on September 19, 1999, warranted his suspension and discharge falls short of showing that even in the absence of his concerted protected activity, Roy would have been suspended and discharged.

Accordingly, I find that by suspending and discharging Ronald Roy the Respondent violated Section 8(a)(3) of the Act as alleged in paragraphs 6 (a)—(e) of the complaint.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.
- (a) Interrogating its employees concerning their union activities.
- (b) Threatening its employees with unspecific reprisals because of their union support and activities.
- (c) Threatening to call the police to remove off-duty employees from its property because they were distributing union literature in a nonwork area.
- (d) Calling the police to remove off-duty employees from its property because they were distributing union literature in a nonwork area.
- (e) Suspending and discharging Ronald Roy because he engaged in concerted protected conduct (i.e., distributing union literature) in support of the Union.
- 4. The Respondent violated Section 8(a)(3) of the Act by suspending and discharging Ronald Roy because he engaged in concerted protected activity and because of his union support and activities.
- 5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
- 6. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged Ronald Roy in violation of Section 8(a)(1) and (3) of

the Act, I shall recommend that the Respondent be ordered to immediately offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his suspension to date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Valeo Sylvania, L.L.C., Seymour, Indiana, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Coercively interrogating its employees concerning their union activities.
- (b) Threatening its employees with unspecific reprisals because of their union support and activities.
- (c) Threatening to call the police to remove off-duty employees from its property because they were distributing union literature in a nonwork area.
- (d) Calling the police to remove off-duty employees from its property because they were distributing union literature in a nonwork area.
- (e) Suspending and discharging Ronald Roy because he engaged in concerted protected conduct (i.e., distributing union literature) and because of his union activities.
- (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Ronald Roy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Ronald Roy whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Ronald Roy and within 3 days thereafter notify Ronald Roy in writing that this has been done and that the suspension and discharge will not be used against him in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copy of the records if stored in electronic form, nec-

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

essary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Seymour, Indiana, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 30, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.